IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5107 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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LALITKUMAR K VADHER

Versus

JUNAGADH MUNICIPALITY

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Appearance:

1. Special Civil Application No. 5107 of 1993

MRS. Sangeeta N PAHWA for MR PM THAKKAR for Petitioner No. 1

MR HRIDAY BUCH for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 05/09/2003

ORAL JUDGEMENT

Heard learned advocate MRS. Sangeeta N PAHWA for MR PM THAKKAR for Petitioner and MR HRIDAY BUCH for

Respondent Junagadh Municipality. By way of this petition under Article 227 of the Constitution of India, the petitioner workman has challenged the award made by the Industrial Tribunal, Rajkot in Reference (IT) No. 180 of 1990 dated 12.4.1993 wherein the tribunal has rejected the reference of the petitioner. Under the said common award made by the tribunal, the tribunal has rejected the reference no. 179 of 1990 relating to the present petitioner Lalit K. Vadher whereas the tribunal has allowed the another reference no. 178 of 1990 relating to the workman Rajesh Kanaiyalal Mehta and has granted the benefit of regularization with retrospective effect.

Initially, on 26.5.2993, notice was issued by this Court by making it returnable on 14.6.1993 and has, in the mean time, directed that the services of the petitioner shall not be terminated. Thereafter, said order of interim relief was ordered to continue till further orders by this court by order dated 18.6.1993. Thereafter, this Court passed the following order on July 5, 1993 while admitting the petition:

"Rule. Expedited. Mr. Jayant N. Patel waives service of rule on behalf of respondent.

Heard learned counsel for the petitioner as regards interim relief. The petitioner has prayed that the respondent be restrained from terminating his services, pending hearing and final disposal of this petition. His prayer is beyond the scope of the dispute. The dispute referred to the tribunal was as to whether the petitioner should be granted permanency benefits or not. Therefore, the question with regard to termination of services of the petitioner did not form part of the subject matter of dispute. However, in order to remove the apprehension of the petitioner, it is directed that even if occasion arise for taking any action for terminating the services of the petitioner, the circumstance that the petitioner has challenged the legality and validity of the award passed by the tribunal by way of this petition and the petition is pending before this court, shall not be taken as a ground for terminating his services."

Learned advocate Ms. Pahwa appearing for the petitioner has submitted that in view of the interim relief granted by this court while admitting the

petition, the petitioner is working with the respondent as a daily wager.

Learned advocate Ms. Pahwa also submitted that the tribunal has committed gross error in not allowing the reference though it was similar to the other workman Rajesh Kanaiyalal Mehta only on the ground that during the pendency of the reference, an advertisement was issued by the respondent Nagarpalika for the post of Overseer wherein the petitioner had not applied and that is how the tribunal rejected the reference of the petitioner. She submitted that once the prayer made before the tribunal by raising an industrial dispute to regularize the services of the petitioner and in-between if any advertisement has been issued by the respondent Nagarpalika, then, the petitioner has not applied for the said post because of the of act that in case if he applies during the pendency of the reference, then, pendency of the reference may come in his way and the respondent may not select him in view of the pendency of the reference and that may ultimately have adverse effect on the result of the pending reference. In view of the above apprehensions, the petitioner had not applied for the post advertised by the respondent Nagarpalika during the pendency of the reference. According to her, the tribunal ought to have decided the reference on its own merits without being influenced by the non application of the petitioner for the post advertised by the respondent Nagarpalika. According to her, the tribunal has erred in rejecting the reference only on the ground that the petitioner has not applied for the post advertised by the Nagarpalika. She also submitted that the reference of the petitioner was similar to the reference no. 178 of 1990 relating to the workman Rajesh Kanaiyalal Mehta wherein the tribunal granted all the relief after considering the evidence and reference of the petitioner similar to reference no. 178 of 1990 was rejected by the tribunal on the aforesaid ground. According to her, the ground assigned for rejecting the reference is not just, proper and tenable and, therefore, this petition is required to be allowed since the petitioner's reference was similar to the reference no. 178 of 1990 of the another workman Rajesh K. Mehta in all respect.

On the other hand, learned advocate Mr. Hriday Buch appearing for the Junagadh Municipality has read the entire award made by the tribunal before this court and has raised the contention that there are financial constraints for the respondent Nagarpalika. According to him, the post of overseer is a technical post and the petitioner is not possessing the requisite qualification

for the post of overseer and, therefore, the tribunal was right in rejecting the reference. According to him, the petitioner was having back door entry and, therefore, the tribunal was right in rejecting the reference. Except these submissions, no other submissions were made by the learned advocate Mr. Buch on behalf of the respondent Nagarpalika. Thus, the sum and substance of the submissions made by the learned advocate Mr. Buch is that (1) there are financial constraints for the respondent Nagarpalika in regularizing the services of the petitioner and (2) the petitioner is not having requisite qualifications for the post of overseer.

The submissions made by the learned advocates for the parties have been considered by me. The impugned award made by the tribunal has also been perused minutely by me. From the perusal of the whole award made by the tribunal, it is becoming clear that only on the ground that the petitioner has not applied for the post of overseer advertised by the respondent Nagarpalika, the tribunal rejected the reference of the petitioner though, otherwise, it was similar on all fours to the reference of the another workman Rajesh K. Mehta namely Reference No. 178 of 1990; though, the ground is not related to the industrial dispute raised by the petitioner. Admittedly, the industrial dispute was raised by the petitioner for regularization of his services. The only distinguishing feature is that the post of octroi clerk was not advertised but the post of overseer was advertised by the respondent Nagarpalika wherein the petitioner had not applied for the said post. It is quite but natural that once when the workman has already raised industrial dispute for regularization of his services and during the pendency of the reference, if any post has been advertised on which the workman was working, he cannot take risk by applying for the post because if, ultimately, the workman is not selected, then, it will be having adverse effect on the pending reference and considering all these aspects and considering the pendency of the reference, the petitioner not applied for the post advertised by the respondent Nagarpalika. Therefore, according to my opinion, it is not necessary for the workman to apply for the post advertised by the employer when dispute is already pending for the demand relating to regularization of the services of such a workman. I am, therefore, of the opinion that the ground on which the reference of the petitioner has been rejected by the tribunal is not legal and valid. It is more so when the tribunal has observed in para 9 of the impugned award that he has completed more than 240 days continuous service. The tribunal

ought to have examined as to whether, as per the length of service and working days are similar to the case of the another workman Rajesh K. Mehta of Reference No. 178 of 1990 or not and whether the petitioner is entitled for the benefit of regularization or not. As regards date of attending and the working days, there is no difference between the present petitioner and the said workman Shri Rajesh K. Mehta. In view of that, this court is of the opinion that the tribunal was not justified in rejecting the reference of the petitioner on such a ground.

As regards the contention raised by the learned advocate Mr. Buch that the petitioner is not qualified for the post of overseer, very specific and pointed question was asked by this court to the learned advocate Mr. Buch as to whether the tribunal made any observation or the evidence in the award would suggest that the petitioner is not qualified for the post of overseer ? For answering this question, learned advocate Mr. Buch has gone through the entire award but he has not been able to answer that the observation or evidence in the award would suggest that the petitioner is not qualified for the post of overseer. In fact, that question has not at all been examined by the tribunal and as a matter of fact, it has also not been raised specifically by the respondent before the tribunal. The other contention raised by the learned advocate Mr. Buch on behalf of the respondent Nagarpalika is that the respondent is having financial constraints and, therefore, is unable to grant the benefit of regularization. This contention was examined by the tribunal and the tribunal has observed that from the evidence of the Chief Officer, it reveals that there are three posts of overseer, amongst which one is reserved for SC/ST. It has also been observed by the tribunal that during the last two years, more than hundred workers were made permanent by the award of the tribunal and the grievance by way of appeal before this court was confined to the payment of arrears only and not to the order of permanency. This would mean that all the said 100 workmen must have been appointed initially as a daily wager, not selected by following proper procedure and they were given benefit of regularization in view of the award made by the tribunal. In short, all the said 100 workmen were having back door entry and their services were regularized by accepting the award made by the tribunal. Thus, this aspect was considered by the tribunal and while passing the final order in the award, the tribunal has taken care of that situation by directing that the services of of the said workman Rajesh K. Mehta be regularized and he be made permanent with

effect from 1.8.1987 and the period from 1.8.87 to 31.3.90 be considered as notional service for the purpose of gratuity benefits and the like benefits and for that period, no arrears should be paid to him and the arrears be paid to him from 1.4.1990. Therefore, even that contention is also not available to the respondent Nagarpalika because services of 100 workmen were regularized pursuant to the award made by the tribunal which was accepted by the respondent principally and ultimately this aspect was considered by the tribunal while granting relief in favour of the said workman Rajesh K. Mehta and after considering this aspect, benefit of arrears was granted only from 1.4.1990 and, therefore, to that extent, the tribunal has not committed any error and in view of the similarity, it ought to have granted similar benefits in favour of the petitioner on the similar line. As regards the qualification aspect,

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the Apex Court has also considered this aspect of regularization in service and also as regular pay scale to such daily wager employees in case of GUJARAT AGRICULTURAL UNIVERSITY V. RATHOD LABHU BECHAR reported in AIR 2001 SC 706. Relevant observations made by the apex court in the said decision are reproduced as under:

" We feel that daily rate workers who have been working on the aforesaid posts for such a long number of years without complaint on these posts is a ground by itself for the relaxation of the aforesaid eligibility condition. It would not be appropriate to disqualify them on this ground for their absorption."

The apex court has further observed that;

"Those working for a period of 10 or more years without any complaint is, by itself, a sufficient reququisite qualification and any other rider on the facts of this case would prejudice these workers."

In respect of the another contention raised by the learned advocate Mr. Buch before this court about the financial constraints of the respondent Municipality, the apex court has, in the matter of Chief Conservator of Forests and another etc. etc. v. Jagannath Maruti Kondhare, etc. etc., reported in AIR 1996 SC 2898, while considering the very same aspect, observed as under:

In respect of the financial constraints raised by the learned advocate Mr. Buch, the apex court has in the matter of Chief Conservator of Forests versus Jagannath Maruti Kondhare reported in AIR 1996 SC 2898 as under in para 28 :

"28. In so far as the financial strain on State exchequer is concerned, which submission is sought to be buttressed by Shri Dholakia is stating that in the Forests Department itself the casual employees are about 1.4 lacs and if all of them were to be regularized and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighborhood of Rs.300 crores a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorem. We have neither been impressed by the first or frightened by the second inasmuch as we do not intend that the view to be taken by us in these applies should apply, propriovigore, to all casual labourers of the Forests Department or any other Department of the Government. "

Thereafter, it has further been observed by the Hon'ble apex court in para 29 of the said judgment as under:

"29. We wish to say further that if Shri Bhandare's submission is taken to its logical end, the justification for paying even minimum wages could wither away, leaving any employer, not to speak of model employer like the State, to exploit unemployed persons. To be fair to Shri Bhandare it may, however, be stated that the learned counsel did not extend his submission this far, but we find it difficult to limit the submission of Shri Bhandare to payment of say fair wages, as distinguished from minimum wages. We have said so, because if a pay scale has been provided for permanent workmen that has been done by the State Government keeping in view its legal obligations and must be one which had been recommended by the State Pay Commission and accepted by the Government. We cannot deny this relief of permanency to the respondent workmen only because in that case they would be required to be paid wages meant for permanent workers.

> This right flows automatically from the relief of regularization to which no objection can reasonably be taken, as already pointed out. We would, however, observe that the relief made available to the respondents is not one which would be available ipso facto to all the casual employees either of the Forest Department or any other Department of the State. Claim of casual employees for permanency or for higher pay shall have to be decided on the merits of their own cases."

Therefore, considering the principles laid down by the Hon'ble apex court in the aforesaid two decisions in light of the facts of the present case, according to my opinion, two contentions raised by the learned advocate Mr. Buch cannot be accepted and the same are, therefore, rejected accordingly. Now, it is necessary to consider that the present respondent was working with the petitioner since 1986, he raised industrial dispute for regularization of his services which was referred to for adjudication and was numbered as reference no. 179 of 1990 and the same was adjudicated in the year 1993 by the tribunal and the tribunal after observing that the petitioner has completed 240 days continuous service, rejected the reference only on the ground that he has not applied for the post of overseer advertised by the petitioner and, therefore, he is not entitled for regularization. The award was made by the tribunal on 12th June, 1993 and in the mean time, almost seven years were completed by the petitioner and after 1993, because of the interim orders of this court, more than ten years have been completed, meaning thereby, now, the petitioner has completed at least 17 years service with the respondent Nagarpalika. In view of that, to deny legitimate right of regularization of his services would amount to giving permission or license to the State Authority to adopt unfair labour practice and to exploit the poor workman like the present petitioner and to compel them to work without giving them any right. Such permission cannot be granted by this Court when legitimate right of regularization has already occurred in favour of the petitioner, it cannot be denied only on the ground that he is disentitled for regularization since he has not participated in the process of selection pursuant to the post advertized by the respondent Nagarpalika. Therefore, aforesaid contentions raised by the learned advocate Mr. Buch cannot be accepted by this court. I am of the opinion that the tribunal has committed basic error in rejecting the reference of the petitioner on such a ground though it had otherwise come

to the conclusion that the petitioner has completed 240 days of service. I am, therefore, of the opinion that the petitioner is entitled for the same and similar relief which has been granted by the tribunal in favour of the another workman Rajesh K. Mehta in Reference No. 178 of 1990. The award made by the tribunal is apparently contradictory and contrary to the facts on the record and, therefore, same would require interference of this court in exercise of the powers of this court under Article 227 of the Constitution of India. Bare perusal of the award makes it clear that the tribunal has come to the conclusion that the petitioner has completed 240 days' continuous service like the other workman Rajesh K. Mehta but that conclusion of the tribunal has not been challenged by the respondent Nagarpalika. The award made by the tribunal in favour of the other workman namely Rajesh K. Mehta in Reference No. 178 of 1990 has also not been challenged by the respondent Nagarpalika.

According to my opinion, while considering this aspect, the tribunal ought to have kept in mind that it was adjudicating the dispute referred to it and it has to adjudicate the same as per the terms of the reference. Reference for adjudication of the dispute was referred to the tribunal much prior to issuance of the advertisement by the respondent Nagarpalika. The matter would have been different if the workman has been challenging his non selection or publication of the advertisement for the post for which the workman was seeking regularization but the workman was not challenging the advertisement for the post published by the respondent Nagarpalika; the workman was also not challenging the selection made by the respondent Nagarpalika pursuant to the said selection process but the workman was seeking regularization of his services after putting in long number of service as rojamdar and, therefore, according to my opinion, the sole ground assigned by the tribunal for rejecting the reference is not tenable. In view of the above discussion, I am of the view that the reasons assigned by the tribunal for rejecting the reference are perverse and contrary to the record and, therefore, same is required to be quashed and set aside by allowing the said reference on the similar lines.

In view of the above discussion, this petition is allowed. The award made by the Industrial Tribunal, Rajkot in Reference (IT) No. 179 of 1990 dated 12th April, 1990 is hereby quashed and set aside and the said Reference No. 179 of 1990 is hereby allowed. It is hereby ordered that the services of the present workman Shri Lalit K. Vadher who has completed continuous

service of 240 days from 1.8.1986 be regularized and be made permanent from 1.8.1987 and the period from 1.8.1987 to 31.3.1990 be considered as notional service for the purpose of gratuity benefits and such other service benefits and for that period, no arrears should be payable to him and the arrears for the period from 1.4.1990 till 30.9.2003 be calculated and paid to him by treating him to have been regularized with effect from 1.8.1987 within three months from the date of receipt of copy of this order. The respondent Nagarpalika is also directed to pay an amount of Rs.500.00 to the petitioner towards costs. Rule is made absolute in terms indicated hereinabove.

Dt.5.9.2003. (H.K. Rathod,J.)

Vyas